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No. 83-219

In the Supreme Court of the United States

October Term, 1983

GARY McDONALD,
Petitioner,

vs.

CITY OF WEST BRANCH, MICHIGAN; PAUL LONGSTREET, CHIEF OF POLICE; BERNARD C. OLSON, CITY MANAGER; CHARLES W. JENNINGS, CITY ATTORNEY; DEMETRE J. ELLIAS, CITY ATTORNEY; UNITED STEELWORKERS OF AMERICA, DISTRICT 29,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED*

1. Should unappealed arbitration awards—as distinguished from state court decisions—be given preclusive effect in cases brought under 42 U.S.C. §1983?

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*All parties to the proceeding in the Court of Appeals are listed in the caption.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The decision of the Court of Appeals is reported at 709 F.2d 1505. Its opinion is not yet reported and is printed in Pet. App. A1-A5. It reversed the judgment of the United States District Court which is printed in Pet. App. A6-A7. The District Court did not write a formal opinion. Its oral order denying defendants' motion for directed verdict is printed in Pet. App. A8-A11. Its order denying defendant Longstreet's motion for judgment notwithstanding the verdict is printed in Pet. App. A12-A13.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on April 19, 1983. Petition for rehearing was denied on May 16, 1983. The petition for writ of certiorari was filed on August 11, 1983, and granted October 3, 1983. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

STATUTES INVOLVED

42 U.S.C. §1983

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

28 U.S.C. §1738

State and Territorial statutes and judicial proceedings; full faith and credit

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall

be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

STATEMENT OF THE CASE[1]

On November 25, 1976, petitioner Gary McDonald was fired from his position as a West Branch, Michigan, police officer. (Tr. 155). McDonald filed a grievance under the union collective bargaining agreement to challenge whether there was contractually required "proper cause" for his discharge. (Ex. 8A, J.A. 26, Tr. 158). The City prevailed at arbitration. (Ex. 35, J.A. 30, Tr. 764-765). McDonald then filed a civil action under 42 U.S.C. §1983 to establish that the firing violated his First Amendment rights. (Complaint, J.A. 3). In the civil action, the District

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1. The transcript of the first five days of proceedings contains pages which are numbered 1 through 781. Those pages will be designated "Tr. ..... ". The transcript of the last two days of proceedings contains different pages which are also numbered 1 through 252. To avoid confusion, these pages will be designated "DTr. ....."

Court declined to give the arbitration decision preclusive effect, but received it in evidence together with the arbitration transcript and testimony regarding the arbitration process. (Tr. 68-69; DTr. 3-7, Pet. App. at 8-11; P. Ex. 34, Tr. 764-765; P. Ex. 35, J.A. 30, Tr. 764-765; *e.g.*, Tr. 165-168, 237-247; DTr. 79-101). The jury rendered a verdict for McDonald finding the Chief of Police had discharged him in violation of his First Amendment rights. (Pet. App. at 15-16).

McDonald's grievance alleged that he had been discharged without "proper cause" in violation of Article III of the collective bargaining agreement.[2] (P. Ex. 8A, J.A. 26, Tr. 158). The arbitrator treated the grievance as raising only one issue: "Was the discharge of Officer Gary McDonald for just cause?" (P. Ex. 35 at p. 2; J.A. 30 at 32; Tr. 764-765). As respondents acknowledge, McDonald did not raise the issue of whether his discharge also violated his First Amendment rights. (Respondents' Brief In Opposition at p. 6, P. Ex. 34, Tr. 764-765). The arbitrator's authority was expressly limited to interpretation and application of the agreement "to the extent necessary to decide the submitted grievance," and he had no authority "to alter, add to, delete from, disregard or amend" the agreement. (P. Ex. 42 §21.2 - Step 5; J.A. 45 at 49; Tr. 587-588). Since it was not submitted to him, he had no authority to deal with the constitutional issue and his decision does not mention it. (P. Ex. 35, J.A. 30).

The arbitrator sustained McDonald's discharge solely on one charge—the charge that he had made "a sexual assault on a minor female." (P. Ex. 35 at pp. 12-13; J.A. 30

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2. Article III provides in relevant part that the City had the right "to discharge employees for proper cause." (P. Ex. 42 §3.0, J.A. 45, Tr. 587-588).

at pp. 42-43, Tr. 764-765). However, until the arbitration hearing itself, defendants had refused to inform McDonald who it was he was supposed to have assaulted and when and where he was supposed to have assaulted her. (Tr. 166, 235-236, 261-262, 535-536, 706-707, 715-716, 719-720, DTr. 89, 117).

The original discharge notice did not even mention a sexual assault but only "conduct unbecoming an officer." (P. Ex. 8, J.A. 22, Tr. 156). The subsequent list of "specific incidents of misconduct" referred to "a sexual assault upon a minor female" but failed to indicate when, where or upon whom the assault had allegedly been made. (P. Ex. 9, J.A. 27, Tr. 160). McDonald made at least six separate requests for the particulars of the charges against him. He made such requests at the time he was discharged (Tr. 155, 567), by phone the following day (Tr. 156-157, 239), at a City Council meeting held December 6, 1976 (Tr. 159, 639), at a grievance committee hearing held December 29, 1976 (Tr. 160, 703-704; P. Ex. 49B, J.A. 52, Tr. 604-605), at a City Council hearing held January 27, 1977 (Tr. 161, 399-400, 534-536, 619-621, 639-640; P. Ex. 49A, J.A. 50, Tr. 604-605), and at a hearing on March 15, 1977. (Tr. 162-163, 688). He had asked the Chief of Police, the City Manager, the Mayor, the City Council, and both City Attorneys for the name of the "minor female" and the date and place of the alleged "sexual assault." (Tr. 155-163, 239, 261-262, 399-400, 534-576, 619-621, 639-640, 688, 703-704, P. Ex. 49A, Tr. 604-605, P. Ex. 49B, Tr. 604-605). Despite these requests, the City failed to identify the alleged victim and the date and location of the alleged assault until the arbitration hearing itself.

The City refused to tell McDonald that Barbara Dack was the person he was supposed to have assaulted because

the City Manager thought it would "give the Union an unfair advantage" if the City had "to show [its] hand." (Tr. 567-568). The refusal was based on the advice of the City Attorney who believed the information should be withheld because "there had been rumors [that] people had been constantly intimidated." (DTr. 89, 87, Tr. 716).

Even at the arbitration, the City failed to disclose to McDonald the existence of an investigation report—signed by the Chief of Police—casting serious doubt on Mrs. Dack's credibility and on the chief's motives. (Tr. 536; P. Ex. 10, J.A. 28, Tr. 505-506). That report showed that the allegations of a sexual assault on Mrs. Dack had been investigated by the chief on October 30, 1976. (P. Ex. 10, J.A. 28). As part of that investigation, the chief interviewed Mrs. Dack and she said nothing about any sexual assault. (P. Ex. 10, J.A. 28; Tr. 498-502, DTr. 36-38, 48-50). The report showed that, after that interview, the chief was sufficiently satisfied of McDonald's innocence to close the investigation. (P. Ex. 10, J.A. 28; Tr. 502).

McDonald was not permitted to have his own lawyer at the arbitration and was represented by a lawyer selected by the union. (Tr. 238). Despite McDonald's urgings, the union refused to call Officer Louis Osten as a witness in his behalf. (Tr. 165-166). Officer Osten had been with McDonald at the time the sexual assault allegedly occurred. (Tr. 165-166, 343, DTr. 31). If called, he would have testified—as he did at trial—that no assault occurred and that McDonald neither touched Mrs. Dack nor said anything offensive to her. (Tr. 343-346, 354).

McDonald was advised by the union's attorney that he did not have the right to appeal the arbitrator's decision and he did not do so. (Tr. 246). Instead, McDonald

brought suit under 42 U.S.C. §1983 asserting jurisdiction under 28 U.S.C. §1343. He alleged that he was discharged in retaliation for exercising his First Amendment rights to freedom of speech and assembly and his right to petition the government for redress of grievances. (Pet. App. at A2; Complaint ¶¶10, 11, J.A. 3, 5). McDonald also alleged that his discharge had deprived him of property without due process.[3]

The District Court declined to give the prior arbitration award preclusive effect. (Tr. 68-69, DTr. 3-7, Pet. App. at 8-11). Instead, relying on this Court's opinion in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), the court received the arbitrator's decision in evidence and permitted the parties to introduce extensive evidence about the arbitration process. (*E.g.*, Tr. 165-168, 237-247, DTr. 79-101, P. Ex. 34, Tr. 764-765, P. Ex. 35, J.A. 30, Tr. 764-765). Both attorneys discussed the decision and transcript in their closing argument. (*E.g.*, DTr. 184, 198). The jurors had the decision and transcript with them in the jury room during their deliberations. (DTr. 202, 259).

After a six-day trial, the jury found that Chief of Police Longstreet had discharged McDonald for exercising his First Amendment rights. (Pet. App. at A15). It awarded McDonald actual and punitive damages against Chief Longstreet. (Pet. App. at A16). The jury found against McDonald with regard to the remaining defendants. (Pet. App. at A2). The District Court entered judgment on the verdict. (Pet. App. at A6-A7).

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3. McDonald's complaint also alleged that the union had breached its state law duty to adequately represent him. The trial court declined to exercise pendent jurisdiction over this state law claim, and it is not before this Court. (Pet. App. at A2).

On appeal, the United States Court of Appeals for the Sixth Circuit reversed, holding that "the district court should have applied res judicata and collateral estoppel principles to dismiss the Section 1983 action." (Pet. App. at A3). The court did not mention or distinguish this Court's decisions in *Alexander, Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981), or *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982), or its own decision in *Becton v. Detroit Terminal of Consolidated Freightways*, 687 F.2d 140 (6th Cir. 1982), *cert. denied*, ... U.S. ....., 103 S. Ct. 1432 (1983). Rehearing was denied on May 16, 1983. (Pet. App. at A14).

SUMMARY OF ARGUMENT

Actions under 42 U.S.C. §1983 should not be made an exception to the rule that an arbitration decision under a collective bargaining agreement will not bar a subsequent action to vindicate individual rights. This rule has been established by decisions of this Court and lower federal courts. Another panel of the Sixth Circuit has said that the rule applies to §1983 itself.

This rule is supported by three independent reasons and each of these reasons is fully applicable to §1983. First, the constitutional rights protected by §1983 are independent of the rights created by collective bargaining agreements. Their waiver may not be made a condition of public employment.

Second, the legislative history of §1983 demonstrates that it was intended to create a judicial remedy for violations of constitutional rights. That history also indicates that denial of redress in another forum was not intended to bar resort to the judicial remedy.

Third, the rights which Congress sought to protect under §1983 will not be as fully protected in arbitration proceedings. Arbitrators' place in the system of industrial self-government, their experience and their training make them ill-suited to the resolution of constitutional issues. As amply demonstrated in this case, arbitration provides few of the procedural protections otherwise available in §1983 actions. Union control of the arbitration process creates an unacceptable danger that the individual rights Congress sought to protect will be subordinated to the collective interest of the bargaining unit.

This Court's decision in *Allen v. McCurry* provides no foundation for granting preclusive effect to arbitration awards. Such awards are not subject to 28 U.S.C. §1738 and the reasoning of *Allen* cannot be stretched to cover them. Michigan courts do not permit arbitration decisions to bar subsequent actions to vindicate individual rights. Therefore, a federal court could not do so even if §1738 did apply. McDonald did not have a full and fair opportunity to litigate his constitutional claims in the arbitration proceedings. Finally, those claims were neither submitted to nor decided by the arbitrator.

ARGUMENT

I

Arbitration Decisions Do Not Preclude Subsequent Statutory Actions to Vindicate Individual Rights.

This case presents the issue of whether actions under 42 U.S.C. §1983 should be made a unique exception to the general rule that an arbitration award under a collective bargaining agreement will not bar a subsequent action to vindicate independent statutory rights. This Court has recognized this rule in actions under Title VII and in actions under the Fair Labor Standards Act. It has strongly implied the same result in actions to vindicate veterans' reemployment rights under the Universal Military Training and Service Act and in actions under the Seaman's Wage Act. Moreover, the lower courts have consistently held that arbitration awards do not bar various statutory actions. In fact, another panel of the Sixth Circuit has stated that the rule applies to suits under §1983 itself.

A. Decisions of This Court Establish That Arbitration Awards Should Not Be Given Preclusive Effect.

In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), this Court held that an adverse arbitration decision did not bar a subsequent Title VII action. *Alexander* provides a striking parallel to the present case. In each, the employer claimed there was "proper cause" for the discharge. *Id.* at 39; P. Ex. 8, J.A. 24. In each, the collective bargaining agreement contained a broad arbitration clause, *Id.* at 40; P. Ex. 42, Article XXI, J.A. 47-49, Tr. 587-588, and a clause making the arbitrator's findings "final and binding." *Id.* at 41-42; P. Ex. 42 §21.2 - Step 5, J.A. 49. In

each case, the plaintiff had filed a grievance which did not claim violation of his statutory rights. *Id.* at 39; P. Ex. 8a, J.A. 26, Tr. 158. In each, the arbitrator did not mention or rule on the statutory issue. *Id.* at 42-43; P. Ex. 35, J.A. 30, Tr. 764-765. In each case, the arbitrator denied the grievance, ruling that the grievant had been "discharged for just cause." *Id.* at 42; P. Ex. 35, J.A. 30 at 44. Finally, in each case, the employer urged that the arbitration award should preclude the employee from bringing a subsequent action to vindicate his civil rights.

In a number of respects, *Alexander* was a stronger case for preclusion than the present one. The collective bargaining agreement in *Alexander* contained an exceptionally broad arbitration clause which covered "any trouble aris[ing] in the plant" as well as disputes arising out of the meaning or application of the collective bargaining agreement. *Id.* at 40 (bracketed material in the original). The arbitration clause in the present case is more limited. It permits arbitration only of complaints involving "interpretation or application of, or compliance with" the agreement, P. Ex. 42 §21.0, J.A. 45 at 47, and only "to the extent necessary to decide the submitted grievance." P. Ex. 42 §21.2 - Step 5, J.A. 45 at 49. The "finality clause" in *Alexander* expressly provided that the decision was to be binding on the "Company, the Union, *and any employees involved.*" *Id.* at 41-42 (emphasis added). The clause in the present case makes no reference to employees and makes the decision binding only "on the parties." P. Ex. 42 §21.2 - Step 5, J.A. 45 at 49. In pre-arbitration proceedings, Alexander explicitly raised the claim that his discharge resulted from racial discrimination and he introduced evidence to support that claim. *Id.* at 42. In contrast, McDonald did not raise his First Amendment claims and submitted no evidence on them at arbitration.

Despite these facts, in *Alexander*, the Court firmly rejected the argument that prior arbitration under the collective bargaining agreement could preclude a subsequent action under Title VII. Since an employee's collectively bargained contractual rights were independent of his individual civil rights, he was entitled to seek to vindicate each in the appropriate forum. *Id.* at 49-50.

The Court pointed out that an arbitrator may interpret and apply a collective bargaining agreement only according to the needs and desires of the parties and the "common law of the shop." *Id.* at 53. If the arbitrator based his decision " 'solely upon the arbitrator's view of the requirements of enacted legislation,' rather than on an interpretation of the collective-bargaining agreement, the arbitrator has 'exceeded the scope of the submission,' and the award will not be enforced." *Id.* at 53 (quoting *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960)). The Court went on to say, "Thus, the arbitrator has authority to resolve only questions of contractual rights, and this authority remains regardless of whether certain contractual rights are similar to, or duplicative of, the substantive rights of Title VII." *Id.* at 53-54.

The Court sharply distinguished an action to vindicate statutory rights from one claiming a violation of the collective bargaining agreement itself.

> "Under the Steelworkers trilogy, an arbitral decision is final and binding on the employer and employee, and judicial review is limited as to both. But in instituting an action under Title VII, the employee is not seeking review of the arbitrator's decision. Rather, he is asserting a statutory right independent of the arbitration process." *Id.* at 54.

While rejecting any suggestion that an arbitration award could preclude the subsequent statutory action, the Court suggested that the award should be admitted into evidence and given such weight as the finder of fact deems appropriate. *Id.* at 60 and n.21. This was exactly what was done in the present case. Tr. 764-765, 165, 168, 237-247, DTr. 79-101.

The teachings of *Alexander* were confirmed in *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981). In *Barrentine*, this Court held that arbitration awards cannot be given preclusive effect in actions under the Fair Labor Standards Act. The arbitration clause in that case was an extremely broad one requiring arbitration of "any controversy" between the parties. *Id.* at 736. Moreover, the subjects of the particular arbitration—wages and hours—were ones at the heart of the collective bargaining process. *Id.* at 738. Nonetheless, the Court rejected the argument that the employees' claims under the statute should be barred by the prior arbitration of their claims under the collective bargaining agreement.

> "Not all disputes between an employee and his employer are suited for binding resolution in accordance with the procedures established by collective bargaining. While courts should defer to an arbitral decision where the employee's claim is based on rights arising out of the collective-bargaining agreement, different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers." *Id.* at 737.

The employees were permitted to pursue their statutory overtime claims even though the arbitrator had denied their contractual wage claims.

In two similar situations, this Court has refused to require employees to pursue their arbitral remedies before asserting their statutory claims in federal court. In *McKinney v. Missouri-Kansas-Texas Railroad Co.*, 357 U.S. 265, 268-270 (1958), this Court held that a returning serviceman's rights under the Universal Military Training and Service Act could be asserted in federal court without first pursuing the contractual grievance and arbitration procedure. And, in *U. S. Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351, 357 (1971), the Court held that a seaman need not submit his wage claim to contractual arbitration before suing for wages under the Seaman's Wage Act.

B. The Sixth Circuit Itself Has Said That Arbitration Should Not Preclude Actions Under 42 U.S.C. §1983.

Surprisingly, another panel of the Sixth Circuit has stated that the rule of non-preclusion should be applied to §1983 itself. In *Becton v. Detroit Terminal of Consolidated Freightways*, 687 F.2d 140 (6th Cir. 1982), *cert. denied*, ... U.S. ....., 103 S. Ct. 1432 (1983), the court stated:

> "In our view, *Gardner-Denver* should not be read as a restriction on the extent to which a Title VII *or section 1983* claimant is entitled to develop his evidence of discrimination." *Id.* at 142 (dictum as to §1983) (emphasis added); *accord Kern v. Research Libraries*, 27 FEP Cases 1007 (S.D. N.Y. 1979).

The Sixth Circuit's decision in the present case does not discuss, distinguish or even mention *Becton*. Pet. App. at A1-A5. It also did not mention *Alexander*, *Barrentine* or *Kremer*.

In *Becton*, the Court of Appeals also rejected the argument that arbitration decisions should have preclusive effect in subsequent §1981 proceedings.

> "[W]e reverse the District Court's holding that it was conclusively bound by the arbitration panel's decision that Becton was discharged for just cause. We hold instead that a federal court may, in the course of trying a Title VII or *section 1981* action, reconsider evidence rejected by an arbitrator in previous proceedings." *Id.* at 142 (emphasis added).

C. The Other Lower Courts Have Consistently Held That Arbitration Awards Should Not Be Given Preclusive Effect in Subsequent Actions Under the Reconstruction-Era Civil Rights Acts.

The decision in *Becton* is in accord with the uniform holdings of the lower courts that adverse arbitration awards should not preclude subsequent actions under the reconstruction-era Civil Rights Acts. *Kern v. Research Libraries*, 27 FEP Cases 1007 (S.D. N.Y. 1979) (42 U.S.C. §§1981, 1983 and 1985); *Liotta v. National Forge Co.*, 473 F. Supp. 1139 (W.D. Pa. 1979) (42 U.S.C. §1981), *modified on other grounds*, 629 F.2d 903 (3d Cir. 1980), *cert. denied*, 451 U.S. 970 (1981); *Hawkins v. Babcock & Wilcox Co.*, 24 FEP Cases 794 (N.D. Ohio 1980) (42 U.S.C. §1981).[4]

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4. Like an action under Title VII, a suit under 42 U.S.C. §1981 may be barred by a *favorable* arbitration decision but only if the plaintiff receives relief which is "fully equivalent what he seeks under his statutory cause of action". *Strozier v. General Motors Corp.*, 635 F.2d 424 (5th Cir. 1981). (Applying the principles enunciated in *Alexander*, 415 U.S. at 51 n.4, to suit under §1981.)

In actions under other federal statutes, the courts have been equally unwilling to accord preclusive effect to prior arbitration awards. In *Marshall v. N. L. Industries, Inc.*, 618 F.2d 1220 (7th Cir. 1980), an arbitrator had issued an award reinstating the employee but denying him back pay. The employee had accepted the benefits of that award. Nonetheless, the Court of Appeals held that the arbitration decision did not bar a subsequent action by the Secretary seeking back pay for the same employee under §11(c) of the Occupational Safety and Health Act (29 U.S.C. §660(c)). The Third Circuit reached the same conclusion in an action seeking reinstatement and back pay on behalf of an employee under §105(c)(1) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. §815(c)(1)). In *Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981), the court held that an arbitrator's finding of just cause is not binding in an action challenging a discharge under MSHA. Similarly, the District of Columbia Circuit has held that the federal courts retain jurisdiction of claims under the Employee Retirement Income Security Act even if contractual claims arising out of the same transaction are subject to compulsory arbitration. *Air Line Pilots Association v. Northwest Airlines, Inc.*, 627 F.2d 272, 276-278 (D.C. Cir. 1980.)

II

Constitutional and Contractual Rights Have Distinctly Separate Natures and Legally Independent Origins. Each Should Be Enforced in Its Appropriate Forum.

As discussed in Part I, above, this Court has consistently ruled that arbitration awards under collective bargaining agreements should not bar subsequent actions to vindicate individual rights. It has recognized that there are three independent reasons for that rule. First, the

individual's statutory and constitutional rights are independent of his rights under the collective bargaining agreement. Second, Congress provided a judicial remedy for violations of those statutory and constitutional rights, and gave no indication that it intended prior arbitration to bar resort to that remedy. Third, the arbitration forum is less suited to the protection of those rights than are the courts. Each of these reasons is as applicable to §1983 as to Title VII or the FLSA. In this Part, we show that the rights protected by §1983 are distinct and independent from those protected by a collective bargaining agreement. In Part III, we show that the 42nd Congress, by enacting §1983, intended to create a judicial remedy to protect constitutional rights. In Part IV, we show that those rights would not be as adequately protected by arbitration as by judicial proceedings.

The constitutional rights protected under §1983 are distinctly individual rights. Moreover, this Court has consistently held that waiver of those rights may not be made a condition of public employment. *Keyishian v. Board of Regents*, 385 U.S. 589, 605 (1967); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *Branti v. Finkel*, 445 U.S. 507, 514-515 (1980). Neither the city acting alone nor the city acting in concert with its employees could have required McDonald to choose between his First Amendment rights and his job. *Keyishian*, 385 U.S. at 605. Discharge for exercise of First Amendment rights is forbidden "regardless of the public employee's contractual or other claim to a job." *Sindermann*, 408 U.S. at 597. In *Sindermann*, this Court held that a public employee's "lack of a contractual or tenure 'right' to re-employment . . . is immaterial to his free speech claim." *Id.* at 597-598.

What this Court said in *Alexander* and again in *Barrentine* is equally applicable here:

"In submitting his grievance to arbitration, an employee seeks to vindicate his contractual right under a collective bargaining agreement. By contrast, in filing a lawsuit under [the statute], an employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence. And certainly no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums." *Barrentine*, 450 U.S. at 745-746 (bracketed material in the original) (quoting *Alexander*, 415 U.S. at 49-50).

III

The 42nd Congress Intended That Constitutional Rights Be Protected Through Judicial Proceedings.

Giving preclusive effect to arbitration awards would defeat the intent of the 42nd Congress. Section 1 of the Civil Rights Act of 1871—the forerunner of §1983—was intended to provide a broad remedy for violations of federally protected rights. *Owen v. City of Independence*, 445 U.S. 622, 635-636 (1980); *Monell v. New York City Department of Social Services*, 436 U.S. 658, 683-687 (1978); Cong. Globe, 42d Cong., 1st Sess. 68 (1871) (Statement of Rep. Shellabarger) [hereinafter cited as Globe]. And Congress intended that the remedy be a judicial remedy. Congressman Dawes, a member of the committee which drafted the bill, stated:

"[W]hat is the proper method of thus securing the free and undisturbed enjoyment of these rights? . . . The first remedy proposed by this bill is a resort to the courts of the United States. . . . I submit to the calm and candid judgment of every member of this

> House that there is no tribunal so fitted, where equal and exact justice would be more likely to be meted out in temper, in moderation, in severity if need be, but always according to the law and the fact, as that great tribunal of the Constitution." Globe at 476.

Another supporter of the bill explained that it was intended to provide "full and complete administration of justice *in the courts.*" Globe at 653 (Remarks of Rep. Osborne) (emphasis added).

Senator Edmunds, the manager of the bill in the Senate, made it clear that a judicial remedy was intended. He stated that the Act was intended "to interpose the calm force of law, through the judiciary . . .," and that it would "enforce the penalty imposed upon [unconstitutional acts] by the proper intervention of the judiciary . . . ." Globe at 691; *see also* Globe at 698.

The Act's opponents also understood that Section 1 provided a judicial remedy. For example, Senator Thurman stated that it left it "in the option of the person who imagines himself injured to sue in the State court or in the Federal court . . . ." Cong. Globe, 42d Cong., 1st Sess., App. at 216 (1871) [hereinafter cited as Globe App.]. He derided the Act on the basis that it left the definition of constitutional rights entirely "to judicial decisions." Globe App. at 216; *see also, e.g.*, Globe at 578 (Remarks of Senator Trumbull).

Both supporters and opponents of the Act indicated that, absent insurrection, the judicial remedy was to be the exclusive remedy for violations of constitutional rights. Senator Edmunds stated that the Act would be "a law to be enforced by the courts through the regular and ordinary processes *of judicial administration and in no other way*, until forcible resistance shall be offered to

the quiet and ordinary course of justice." Globe at 698 (emphasis added). Senator Trumbull, an opponent of the Act, expressed the contemporary understanding that the courts were the only permissible forums for vindication of Fourteenth Amendment rights.

> "[I]n regard to all the rights secured by the fourteenth amendment, however extended, in time of peace, *the courts are established to vindicate them, and they can be vindicated in no other way.* Sir, the judicial tribunals of the country are the places to which the citizen resorts for protection of his person and his property in every case in a free government." Globe at 578 (emphasis added).

While these remarks did not directly deal with arbitration, they provide a strong indication that Congress did not intend the judicial remedy to be supplanted.

The legislative history also indicates that victims of constitutional wrongs were to have access to the courts even if they had unsuccessfully sought relief elsewhere. Representative Coburn stated:

> "Obviously, the court of justice is the first instrument to be used in aid of the fourteenth amendment: safer, milder, surer, more in accordance with reason, with our system, and with public sentiment. Whenever, then, there is a denial of equal protection by the State, the courts of justice of the nation stand with open doors, ready to receive and hear with impartial attention, the complaints of *those who are denied redress elsewhere*. Here may come the weak and poor and downtrodden, with assurance that they shall be heard. Here may come the man smitten with many stripes and ask for redress." Globe at 459 (emphasis added).

Thus, while the legislative history does not directly deal with arbitration, there is certainly "no suggestion in [it] that a prior arbitral decision either forecloses an individual's right to sue or divests the federal courts of jurisdiction." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974).

IV

Arbitration Is Not an Appropriate Forum to Provide the Expansive Protection of Constitutional Rights Intended by the 42nd Congress.

A. Arbitrators' Experience and Training and Their Role in Our System of Industrial Self-Government Make Them Inappropriate Decisionmakers in Cases Involving Individual Constitutional Rights.

The 42nd Congress could not have intended that Fourteenth Amendment rights be conclusively determined by arbitrators. As this Court has repeatedly stated, "arbitral procedures [are] less protective of individual statutory rights than are judicial procedures." *Barrentine*, 450 U.S. at 745; *Alexander*, 415 U.S. at 57-58. Arbitrators' special competence is "the law of the shop, not the law of the land." *Alexander*, 415 U.S. at 57; *Barrentine*, 450 U.S. at 743; *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 478 (1982). They have no more expertise in resolving constitutional issues under §1983 than in resolving discrimination issues under Title VII or wage and hour issues under the FLSA. Like Title VII, §1983 contains "broad language [which] frequently can be given meaning only by reference to public law concepts." *Alexander*, 415 U.S. at 57. Like FLSA cases, suits under §1983 involve questions which "must be resolved in light of volumes of

legislative history and [many] decades of legal interpretations . . . ." *Barrentine*, 450 U.S. at 743. Arbitrators—many of whom are not attorneys—have no presumed expertise in such matters. *Alexander*, 415 U.S. at 57 n.18; *Barrentine*, 450 U.S. at 743 n.21. Unlike state courts, arbitrators are not "charged with enforcing laws and . . . presumed competent to interpret those laws." *Kremer*, 456 U.S. at 478. They are selected because of their knowledge of the demands and norms of industrial relations—not their knowledge of constitutional rights. *Alexander*, 415 U.S. at 57.

Arbitrators are trained to consider factors which are entirely irrelevant to vindication of constitutional rights under §1983. An arbitrator considers "such factors as the effect upon productivity of a particular result, its consequences to the morale of the shop, [and] his judgment whether tensions will be heightened or diminished." *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960). Yet, Congress could not have intended to permit infringement of constitutionally protected rights simply because doing so would improve morale, diminish tensions or increase productivity.

Unlike courts, arbitrators must enforce the private law created by the collective bargaining agreement rather than the public law established by the Constitution and §1983. Like the arbitrator in this case, most arbitrators have no authority to disregard the agreement or supplement it.[5] P. Ex. 42 §21.2 - Step 5, J.A. 45 at 49, Tr. 587-588. This Court has repeatedly held that an arbitrator's

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5. In this case, the arbitrator was not even permitted to interpret and apply the agreement except "to the extent necessary to decide the submitted grievance." (P. Ex. 42 §21.2 - Step 5; J.A. 45 at 49; Tr. 587-588).

duty is to apply the contract according to the intent of the parties rather than to apply principles of public law. *Warrior & Gulf Navigation*, 363 U.S. at 581; *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597-598 (1960); *Alexander*, 415 U.S. at 53, 56-57; *Barrentine*, 450 U.S. at 744; *Kremer*, 456 U.S. at 478. Moreover, if the arbitrator does base an award on his views of public law requirements, he has " 'exceeded the scope of the submission,' and the award will not be enforced." *Alexander*, 415 U.S. at 53 (quoting *Enterprise Wheel*, 363 U.S. at 597); *Barrentine*, 450 U.S. at 744.

The institutional limitations of arbitration as a remedy pose unacceptable risks that individual interests will be subordinated to collective interests. As one commentator —himself an experienced arbitrator—has stated:

> "They [the union and employer] select and pay the arbitrator, make the record before him, and sometimes seek clandestinely to supplement it. The arbitrator's future employment depends on his acceptability to them or to groups sharing their interests, as distinguished from the individual aggrieved by alleged discrimination. One need not accept Judge Hays's denigration of the arbitration process to recognize that there is some basis for the fear that economic self-interest and the desire to be loved, which are linked with future acceptability, may distort adjudication even when there is complete harmony between the individual's interests and those of his representative. The danger of such distortion is obviously increased when the interests of the individual and the union conflict." Meltzer, *Labor Arbitration and Overlapping and Conflicting Remedies for Employment Discrimination*, 39 U. Chi. L. Rev. 30, 44 (1971).

B. Arbitration Procedures Provide Inadequate Protection to the Constitutional Rights Which Congress Sought to Protect.

Arbitration is not an appropriate forum for vindication of the constitutional rights Congress intended to secure, since it provides few, if any, of the pretrial, trial or appellate review protections provided in judicial forums. The arbitration record is not as complete. The rules of evidence are applied in a relaxed fashion or not at all. Discovery and compulsory process are often unavailable. *Alexander*, 415 U.S. at 57-58.

These deficiencies are strikingly demonstrated by the present case. One of the charges alleged that McDonald had made "a sexual assault on a minor female," but the charge did not give the name of the alleged victim or the date or location of the alleged assault. P. Ex. 9, J.A. 27, Tr. 160. As discussed in the Statement of the Case, the City refused to reveal this information despite at least six separate requests for the particulars. Until the alleged victim was called to the stand in the arbitration hearing itself, McDonald did not know who he was supposed to have assaulted or when or where he was supposed to have assaulted her. Tr. 166, 235-236, 261-262, 535-536, 706-707, 715-716, 719-720, DTr. 89, 117.

Without discovery, McDonald was unable to learn of the existence of at least two crucial documents, each of which cast serious doubt on the City's case. First, he was unable to discover or examine Plaintiff's Exhibit 10—Chief Longstreet's signed investigative report on the "Dack incident." Tr. 536; P. Ex. 10, J.A. 28, Tr. 505-506. That report showed that, on October 30, the Chief had personally interviewed the alleged victim, that she had said nothing about a sexual assault, and that the chief had concluded

that there was no reason for further investigation. P. Ex. 10, J.A. 28, Tr. 505-506; Tr. 498-502, DTr. 36-38, 48-50. The contents of the report raised serious questions about the chief's motivations and Mrs. Dack's credibility. It was available in the federal trial but not in the arbitration.

Similarly, McDonald was unable to discover or examine Plaintiff's Exhibit 11—the notes from which his discharge notice was prepared. P. Ex. 11, Tr. 526, 562. These notes, although supposedly setting forth the reasons for the discharge, did not mention Barbara Dack or any incident of sexual assault. The notes—prepared by the chief himself—cast serious doubt on his claim that the "Dack incident" was the real reason for McDonald's discharge. They were available in the federal trial but not in the arbitration.

An additional deficiency in the arbitration process is that "arbitrators very often are powerless to grant the aggaggrieved employees as broad a range of relief" as Congress authorized. *Barrentine*, 450 U.S. at 745. Under §1983, a court can award actual damages and, in appropriate cases, punitive damages. *Carey v. Piphus*, 435 U.S. 247 (1978); *Smith v. Wade*, ... U.S. ....., 103 S. Ct. 1625 (1983). Actual damages may include damages for emotional distress. *Carey*, 435 U.S. at 264. The court can award reasonable attorney's fees and costs. 42 U.S.C. §1988. An arbitrator's remedial power is far more limited. He is confined to interpretation and application of the collective bargaining agreement and can issue only such relief as is authorized by it. *Barrentine*, 450 U.S. at 745. "It is most unlikely that he will be authorized to award [punitive] damages, costs or attorney's fees." *Id.* It is equally unlikely that he would be authorized to award compensation for losses not directly related to loss of employment, such as emotional distress or injury to reputation.

Finally, judicial review of arbitration awards is far more limited than appellate review of judicial decisions. *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596-599 (1960). As discussed above, there is no reason to believe that Congress intended that §1983 cases be tried in any non-judicial forum. It is even less likely Congress intended they be tried in such a forum if its decisions would be less thoroughly reviewed than those of a state or federal court. *Accord Detroit Fire Fighters Association v. City of Detroit*, 408 Mich. 663, 293 N.W.2d 278, 283 (1980) (Michigan law).

C. Union Control of the Arbitral Process Poses Unacceptable Risks to the Rights of §1983 Claimants.

Arbitration is an inappropriate forum for vindication of individual constitutional rights because arbitration is controlled, shaped and administered by the union—not the individual. While union control is appropriate when the rights to be vindicated are those created and defined by the union's contract, such control poses different and unacceptable risks when individual constitutional or statutory rights are involved. As this Court stated in *Alexander*:

> "A further concern is the union's exclusive control over the manner and extent to which an individual grievance is presented. . . . In arbitration, as in the collective bargaining process, the interests of the individual employee may be subordinated to the collective interests of all employees in the collective bargaining unit." 415 U.S. at 58 n.19.

Similarly, in *Barrentine*, the Court expressed its concern that, "even if the employee's claim were meritorious,

his union might, without breaching its duty of fair representation, reasonably and in good faith decide not to support the claim vigorously in arbitration." 450 U.S. at 742.

In disputes *under the collective bargaining agreement*, it may be acceptable to risk the subordination of the individual's interests to those of the majority of his co-workers. Collective bargaining is a "majoritarian process." *Alexander*, 415 U.S. at 51. The rights conferred by the agreement are collective rights achieved by collective struggle and may be sacrificed for the collective good. *Barrentine*, 450 U.S. at 735; *Alexander*, 415 U.S. at 51.

However, the rights protected under §1983 are distinctly individual rights. Waiver of those rights may not be made a condition of public employment. *Keyishian v. Board of Regents*, 385 U.S. 589, 605 (1967); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *Branti v. Finkel*, 445 U.S. 507, 514-515 (1980). Neither the city acting alone nor the city acting in concert with its employees could have required McDonald to choose between his First Amendment rights and his job. *Keyishian*, 385 U.S. at 605. Discharge for exercise of First Amendment rights is forbidden "regardless of the public employee's contractual or other claim to a job." *Sindermann*, 408 U.S. at 597. Just as the union may not subordinate those rights to the perceived common good during collective bargaining, it should not be permitted to do so during grievance arbitration.

As the court recognized in *Alexander*, there is special reason to be concerned about the union's control of arbitration when the dispute involves civil rights. 415 U.S. at 58 n.19. Section 1983 is frequently used to protect the rights of public employees whose speech or beliefs or associations are as unpopular with their co-workers as with

their employers. It is invoked to protect the public employment rights of racial and religious minorities and of women. It is often invoked to protect the rights of the perceived "trouble-maker" who union and management both want out of their way so that business as usual may proceed. As one supporter of the Civil Rights Act asked, "What benefit would result from appeal to tribunals whose officers are secretly in sympathy with the very evil against which we are striving?" Globe at 394 (Statement of Rep. Rainey).

Even where the interests of the employee and the unior appear to coincide, there are often significant differences. The union may legitimately conclude that preserving a harmonious collective bargaining relationship is more important than prevailing in the particular grievance. It may conclude that the interests of an individual employee do not justify expending the resources necessary to fully protect those interests. It may prefer to avoid setting a procedural precedent which, although beneficial to the particular employee, would be harmful to the union in future arbitrations.

Some of the dangers posed to individual rights by the union's control of the arbitration process are well illustrated by the present case. McDonald was not permitted to have his own lawyer at the arbitration and was represented by a lawyer assigned by the union. Tr. 238. McDonald had little if any contact with that lawyer before the arbitration hearing. Tr. 241. At the hearing, McDonald urged the union to call Officer Louis Osten as a witness in his behalf, but the union refused to do so. Tr. 165-166. Officer Osten was a crucial witness regarding the "Dack incident," since he had been with McDonald at the time of the alleged sexual assault. Tr. 165-

166, 343, DTr. 31. In the federal trial, he testified unequivocally that no such assault occurred and that McDonald neither touched Mrs. Dack nor said anything offensive to her. Tr. 343-346; 354. His testimony was persuasive corroboration of McDonald's and would have been of considerable value in the arbitration.

V

Allen v. McCurry Provides No Foundation for Giving Preclusive Effect to Arbitration Decisions.

In *Allen v. McCurry*, 449 U.S. 90 (1980), this Court held that, under 28 U.S.C. §1738, the federal courts should give preclusive effect to prior decisions of state courts in certain circumstances. Under *Allen*, preclusion is inappropriate in this case for at least four independent reasons. First, 28 U.S.C. §1738 does not apply to arbitration awards. Second, if §1738 were invoked, the preclusion law of Michigan would apply and Michigan does not give preclusive effect to arbitration awards in subsequent statutory actions. Third, the arbitration proceedings did not provide McDonald with a full and fair opportunity to litigate his claim. Fourth, McDonald did not present his constitutional claims to the arbitrator and the arbitrator did not pass on them.

A. Arbitration Awards Are Not Subject to the Mandate of 28 U.S.C. §1738 and the Reasoning of *Allen* Cannot Be Stretched to Cover Them.

Less than two years ago, in *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 477 (1982), this Court unquivocally stated, "Arbitration awards, of course, are not subject to the mandate of [28 U.S.C.] §1738." The reasons for the Court's confidence are apparent on the face of the statute. It provides:

> "The records and *judicial proceedings of any court* of any such State . . . shall be proved or admitted *in other courts* within the United States . . . by the attestation of the clerk and *seal of the court* annexed, if a seal exists, together with a certificate *of a judge of the court* that the said attestation is in proper form.
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> "Such Acts, records and *judicial proceedings* . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the *courts* of such State . . . from which they are taken." 28 U.S.C. §1738 (emphasis added).

The Court expressly distinguished *Alexander* and explained that the reasons for giving preclusive effect to court decisions did not apply to arbitration awards. *Kremer*, 456 U.S. at 477-478. In addition, while stating that state agencies were more competent to resolve civil rights cases than arbitrators, the Court refused to give preclusive effect to state agency proceedings. *Id.* at 470 n.7.

Moreover, the reasoning of *Allen* simply cannot be stretched to cover arbitration. For example, the *Allen* Court stated that preclusion would "promote the comity between state and federal courts that has been recognized as a bulwark of the federal system." 449 U.S. at 96. But principles of state-federal comity are not implicated by denying preclusive effect to decisions of arbitrators since they are creatures of private agreement rather than state law. The Court stated that the debates on the Act contained reference "to the concurrent jurisdiction of the state courts over federal questions." *Id.* at 99. But there are no such references to arbitration. It noted the "constitutional obligation of the state courts to uphold federal law, and [the Court's] confidence in their ability to do so." *Id.* at 105. But arbitrators have no such obligation

and the Court has repeatedly emphasized its serious doubts about arbitrators' ability to resolve public law issues.[6] *Kremer*, 456 U.S. at 477; *Alexander*, 415 U.S. at 52-54; 56-59; *Barrentine*, 450 U.S. at 742-745.

B. Michigan Courts Do Not Give Awards Preclusive Effect in Actions to Vindicate Individual Rights.

Preclusion is also inappropriate since the courts of Michigan would not give preclusive effect to the award in this case. As the unanimous Court said in *Haring v. Prosise*, ... U.S. ....., ... n.6, 103 S. Ct. 2368, 2373 n.6 (1983):

> "If the state courts would not give preclusive effect to the prior judgment, 'the courts of the United States can accord it no greater efficacy' under §1738. *Union & Planters' Bank of Memphis v. Memphis*, 189 U.S. 71, 75 (1903)."

Michigan courts do not give arbitration awards preclusive effect in subsequent suits to vindicate individual rights. The state's public policy strongly favors recognition of overlapping and cumulative remedies for violations of civil rights. As a result, Michigan courts have

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6. *Allen* simply did not deal with arbitration. Its repeated references to state *courts* shows it was concerned only with the effect of prior decisions of courts. *E.g.*, *Id.* at 96 (Under §1738, Congress required the federal courts to "give preclusive effect to state-court judgments . . . ."); *Id.* at 97 (In 1871 preclusion could have applied "following state-court litigation . . . ."); *Id.* at 98 (Section 1983 "says nothing about the preclusive effect of state-court judgments."); *Id.* at 99 (Legislative history provides only limited support for denying preclusion "where state courts have recognized the constitutional claims . . . ."); *Id.* (Congress was not "subtracting from [the jurisdiction] of the state courts."); *Id.* at 101 (Congress did not intend to forbid preclusion "after a full and fair hearing in a state court simply because the state court's decision may have been erroneous.")

consistently refused to give preclusive effect to arbitration awards in actions to enforce an individual's statutory or constitutional rights. Moreover, since there is no Michigan public policy favoring public sector grievance arbitration, preclusion is even less appropriate in this case than it was in *Alexander* and *Barrentine*.

1. Michigan Public Policy Favors Cumulative Remedies to Vindicate Civil Rights.

Michigan courts have repeatedly held that the public policy of the state favors the existence of overlapping and cumulative remedies for the vindication of civil rights. In *Michigan Civil Rights Commission ex rel. Boyd v. Chrysler Corp.*, 64 Mich. App. 393, 235 N.W.2d 791, 798 (1975), the court stated that Michigan recognized the appropriateness of "cumulative and overlapping remedies in the most important context of civil rights . . . ." In *Chrysler Corporation v. Michigan Civil Rights Commission*, 68 Mich. App. 283, 242 N.W.2d 556, 559 (1976), the court stated:

> "We are not inclined to disregard the recent recognition given to the independence of employees' contractual and constitutional or statutory rights to be free from discrimination in employment."

Similarly, in *Hernden v. Consumer Power Co.*, 72 Mich. App. 349, 249 N.W.2d 419, 421 (1976), the court stated, "Decisions since *Pompey* . . . have stressed the independence in scope, purpose and source of statutory, civil and contractual remedies for alleged discrimination in private employment."[7]

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7. In the seminal case of *Pompey v. General Motors Corporation*, 385 Mich. 537, 189 N.W.2d 243 (1971), the Michigan Supreme Court held that, even though the state had passed a com-

(Continued on following page)

2. Michigan Courts Refuse to Give Arbitration Awards Preclusive Effect in Actions Under Statutes Protecting Individual Rights.

As a result, Michigan courts have consistently held that, in actions to vindicate constitutional or statutory rights, prior arbitration awards will not be given preclusive effect. A prior arbitration award does not prevent a subsequent action under the Michigan Fair Employment Practices Act. Similarly, the Michigan Supreme Court has held that the state equivalent of the NLRB (the Michigan Employment Relations Commission or "MERC"), is not permitted to defer to arbitration. We have been unable to identify a single decision in which a Michigan court has held that an action to vindicate an employee's statutory or constitutional rights was barred by a prior arbitration award.[8]

In *Michigan Civil Rights Commission ex rel. Boyd v. Chrysler Corp.*, 64 Mich. App. 393, 235 N.W.2d 791, 797-798 (1975), the court embraced the reasoning and holding of *Alexander v. Gardner-Denver Co.* and held that a prior adverse arbitration award would not be given *res judicata* effect in a subsequent action under the Michigan Fair Employment Practices Act. The court stated

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Footnote continued—

prehensive Fair Employment Practices Act, an employee could maintain a separate civil action for employment discrimination. The importance of fully protecting civil rights justified creation of this cumulative remedy even though no such cause of action existed at common law. 189 N.W.2d at 249-255.

8. Of course, Michigan courts have held that an arbitration award could be conclusive in a subsequent action *under the collective bargaining agreement*. However, as discussed below, they have consistently recognized the distinction between employees' collectively bargained contractual rights and their individual statutory and constitutional rights.

that Michigan favored "cumulative and overlapping remedies" for violations of civil rights. It recognized that an employee's contractual and statutory rights "have legally independent origins" which can be separately vindicated in separate proceedings.

Similarly, the Michigan Supreme Court has held that MERC may not defer unfair labor practice cases to arbitration. In *Detroit Fire Fighters Association v. City of Detroit*, 408 Mich. 663, 293 N.W.2d 278 (1980), the court held that "our state's public policy is best served when public employment disputes, *implicating statutory rights*, are resolved under a system which provides significant procedural, and appellate review, protections." 293 N.W.2d at 283 (emphasis added). The court rejected the NLRB's practice under *Collyer Insulated Wire*, 192 NLRB 837 (1971) and *Spielberg Manufacturing Co.*, 112 NLRB 1080 (1965), of deferring to contractually established grievance arbitration. Instead, it held that public employees were entitled to have their statutory unfair labor practice charges heard under the statutorily established procedure.

In a similar situation, MERC held that a city which had a collectively bargained grievance procedure as well as an identical civil service hearing procedure was required to process a discharge under both. In *City of Grand Rapids*, 1975 MERC Lab Op 102 (1975), MERC held that a city's failure to provide the hearing required by the collective bargaining agreement was an unfair labor practice even though the city had already provided an identical hearing under its civil service rules. It rejected the argument that this gave the employee "two bites at the apple," reasoning that the grievance procedure hearing was only the union's "bite" and the civil service hearing was the employee's "bite." *Id.* at 109.

3. The Absence of Any Michigan Public Policy Favoring Public Sector Grievance Arbitration Militates Against Granting Preclusive Effect to the Award in This Case.

Michigan's refusal to give prior arbitration awards preclusive effect in suits to vindicate statutory rights follows logically from the fact that there is no Michigan public policy favoring public sector grievance arbitration. The absence of such a policy makes preclusion even less appropriate in this case than it was in *Alexander* or *Barrentine*.

In *Detroit Fire Fighters*, the Michigan Supreme Court specifically rejected the argument that the state's public policy favored public sector grievance arbitration. The dissent had argued that Michigan law favored arbitration of grievances. 293 N.W.2d at 300-301 (Williams, J., dissenting). But the majority, while agreeing with the dissent that the state had manifested a preference for grievance arbitration "in the *private sector*," found no such preference in the public sector. *Id.* at 281 (emphasis supplied by the court). The court pointed out that while the title to the private-sector Labor Mediation Act (M.C.L. §423.1 *et seq.*; M.S.A. §17.454(1) *et seq.*) specifically referred to arbitration, there was no such reference in the state's Public Employment Relations Act. 293 N.W.2d at 281. The court also explained that, in situations in which the state had intended the use of arbitration in the public sector (for "interest" or contract formation arbitration), the legislature had provided for it explicitly. *Id.* at 281-282. The court concluded that deferral to arbitration was forbidden. The court rejected even limited deferral of the type given by the NLRB under the *Collyer-Spielberg* doctrine. *Id.* at 280-281.

In *Alexander* and *Barrentine*, the reasons for denying preclusive effect to arbitration awards had to be weighed against the strong federal policy favoring arbitration of private-sector grievances. 415 U.S. at 46; 450 U.S. at 734-736. Nonetheless, preclusion was denied. Since Michigan has no such policy regarding public-sector grievances, there is even more reason to deny preclusive effect to the arbitration award in the present case."

Like the federal courts, Michigan courts recognize that arbitration awards may conclusively determine an employee's rights *under the collective bargaining agreement*. However, they have repeatedly articulated the distinction between those rights and the independent rights conferred on individual employees by legislative action. In *Michigan Civil Rights Commission ex rel. Boyd*, 235 N.W.2d at 798, the court stated that contractual and statutory rights have "legally independent origins." In *City of Grand Rapids v. Grand Rapids Lodge No. 97, Fraternal Order of Police*, 415 Mich. App. 628, 330 N.W.2d 52 (1982), the court stated:

> "We note that while a union may bargain away collective rights, individual rights of employees may not be bargained away. See, *e.g.*, *Alexander* (Title VII right to equal employment opportunities); *NLRB v. Magnavox Co.* (employee's right to choose bargaining agent); *Barrentine v. Arkansas-Best Freight System, Inc.* (right to overtime pay under the Fair Labor Standards Act); *Employment Security Comm. v. Vulcan Forging Co.*, 375 Mich. 374, 134 N.W.2d 749 (right to unemployment compensation)." 330 N.W.2d at 55 n.6 (citations omitted).

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9. Since public employers are excluded from the Labor Management Relations Act, there is no federal public policy favoring arbitration of public employee grievances. 29 U.S.C. §152(2).

C. McDonald Was Not Given a Full and Fair Opportunity to Litigate His Constitutional Claims.

Of course, even a state court judgment is not given preclusive effect if the party did not have a "full and fair opportunity to litigate the claim . . . ." in that court. *Allen*, 449 U.S. at 101. It may be that the teaching of *Kremer, Alexander* and *Barrentine* is that arbitration does not, as a matter of law, ever provide such an opportunity. McDonald certainly had no such opportunity.

At a minimum, a full and fair opportunity to challenge a termination based on charges of misconduct requires "timely and adequate notice detailing the reasons for [the] proposed termination." *Goldberg v. Kelly*, 397 U.S. 254, 267-271 (1970). As discussed in detail in the Statement of the Case, McDonald was required to defend a charge that, at an unidentified place and on an unspecified date, he had assaulted an un-named female. Despite at least six requests for the particulars of the charges, the city refused to reveal who it was he was supposed to have assaulted or where or when he was supposed to have assaulted her. He learned this information only when the alleged victim testified at the hearing itself. Even under the most charitable construction, this is far from "timely and adequate notice."

Moreover, crucial exculpatory evidence was not disclosed by the City. As discussed in Part IV B, above, the City failed to disclose the existence of an investigative report—signed by Chief Longstreet—which cast serious doubt on the credibility of the alleged victim. It also failed to disclose Plaintiff's Exhibit 11, the Chief's handwritten notes which indicated that the "Dack incident" was a *post hoc* pretextual justification for the discharge.

A full and fair opportunity to be heard requires that the opposing party not conceal evidence. *Precision Fittings, Inc.*, 141 NLRB 1034 (1963) (arbitration proceedings not fair and regular if evidence is deliberately withheld from the arbitrator).

Finally, the arbitration hearing was not full and fair because McDonald did not control his own defense. *Cf., Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). The disastrous decision not to call Officer Osten was made by the union over McDonald's protests. Tr. 165-166.

D. McDonald Did Not Present His Constitutional Claims to the Arbitrator and the Arbitrator Did Not and Could Not Decide Them.

The arbitration award cannot preclude McDonald's First Amendment claims since those claims were not presented to or decided by the arbitrator. Respondents have acknowledged that McDonald's constitutional claims were not presented either before or at the arbitration hearing. Respondents' Brief In Opposition at 6-7, 10. Neither the grievance nor the submission to arbitration ever mention those claims. P. Ex. 8A, J.A. 26, Tr. 158; P. Ex. 31, J.A. 29, Tr. 763. The arbitrator's decision does not purport to resolve them. P. Ex. 35, J.A. 30, Tr. 764-765. He had no jurisdiction to do so since the collective bargaining agreement gave him authority to interpret and apply the contract only "to the extent necessary to decide the submitted grievance." P. Ex. 42, §21.2 - Step 5, Tr. 587-588.

In *Migra v. Warren City School District Board of Education*, No. 82-738 (U.S. *cert. granted*, Jan. 10, 1983), this Court is considering whether a §1983 plaintiff may litigate in federal court an issue which he might have,

but in fact did not, raise in a prior state court action. A decision denying preclusion in *Migra* would dictate the same result here. But the opposite decision in *Migra* would not control this case.

Where a plaintiff with both a state law claim and a claim under §1983 must choose between filing suit in federal or state court, neither option forces him to surrender either of his claims. His federal claim under §1983 is cognizable in state court. *Martinez v. California*, 444 U.S. 277 (1980). His state claim can be heard in federal court under pendent jurisdiction. (Even if abstention is invoked, he will still have an opportunity to present his state claim in the state court. It will not be lost.)

But if such a plaintiff must choose between federal court and arbitration, one of his claims will be jeopardized whichever forum he chooses. If he elects to sue in federal court under §1983, he will forfeit his contractual rights since he will have foregone the contractually established arbitral remedy. If both claims are to be heard at all, they could only be heard in the arbitral forum. Thus, he must choose between foregoing his contractual right by filing suit in federal court or jeopardizing his constitutional rights by attempting to vindicate them in an inappropriate forum. The likely outcome would be an increase in the federal courts' caseload as individuals choose to bypass arbitration to protect their constitutional rights.

Since McDonald's constitutional claims were neither presented to nor decided by the arbitrator, NLRB's *Spielberg* deferral doctrine—even if applicable to §1983—would not govern this case. In *Suburban Motor Freight, Inc.*, 247 NLRB 146, 146-147 (1980), the Board held:

> "[W]e will no longer honor the results of an arbitration proceeding under *Spielberg* unless the unfair labor practice issue before the Board was both presented to and considered by the arbitrator. . . . [W]e will give no deference to an arbitration award which bears no indication that the arbitrator ruled on the statutory issue of discrimination in determining the propriety of an employer's disciplinary actions. . . . [W]e shall impose on the party seeking Board deferral to an arbitration award the burden to prove that the issue of discrimination was litigated before the arbitrator."

In addition, the NLRB would not defer in this case since, as discussed in Part V C above, the arbitration proceedings were not "fair and regular." *Spielberg Manufacturing Co.*, 112 NLRB 1080 (1955). For reasons amply set forth in Part V of *Alexander*, neither the *Spielberg* doctrine nor a more strictly limited deferral doctrine should be adopted for §1983. 415 U.S. at 55-61.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Sixth Circuit should be reversed.

Respectfully submitted,

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